

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-2084

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

LEONARD FAMBO,
Petitioner-Appellant,

v.

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,
Respondent-Appellee.

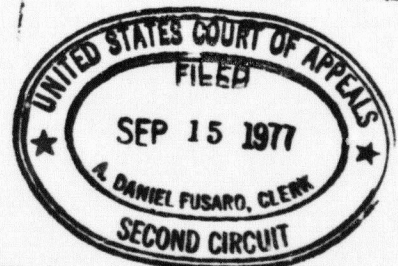
ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF NEW YORK.

JOINT APPENDIX

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Notice of Appeal.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

LEONARD FAMBO

Petitioner-Appellant

-vs-

NOTICE OF APPEAL

HAROLD J. SMITH, Superintendent
Attica Correctional Facility

Civil 76-4

Respondent

PLEASE TAKE NOTICE that the Petitioner, LEONARD FAMBO, hereby appeals to the United States Court of Appeals for the Second Circuit from an Order and Judgment of the United States District Court for the Western District of New York (Curtin, Ch. J.) dated June 23, 1977 and amended by Order dated June 27, 1977 denying the Petitioner a Writ of Habeas Corpus and from each and every part of said Order and Judgment.

Yours, etc.

DATED: July 8, 1977

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Buffalo, New York 14202

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Attention: James L. Kennedy

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Docket Sheet.

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PLAINTIFFS

DEFENDANTS

14300, Leonard

SMITH, Harold R. Superintendent
Attica Correctional Facility

CAUSE Habeas corpus.

pah

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UNITED STATES DISTRICT COURT DOCKET

DC-111 (Rev. 1-77)

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Docket Sheet.

10-76-4 Leonard Pambo v. Harold R. Smith, Supt. Attica

DATE	NR.	PROCEEDINGS
Jan. 7	7	Filed petition for writ of habeas corpus.
7	7	" order to show cause why a writ of habeas corpus should not issue etc. ret. 1-19-76-Curtin, DJ Adj. 2-26-76 F-17
7	7	JS 5 made
16	16	Filed defts. answer to complaint.
19	19	" affidavit of Salten Rodenberg on behalf of petr.
19	19	" affidavit of Philip B. Abramowitz on behalf of petr.
19	19	" affidavit of Thomas D'Agostino on behalf of petr.
19	19	" affidavit of Leonard Pambo
23	23	defts. memorandum of law.
26	26	Ret. of order to show cause. Adj. to 2-2-76 at 9:00am
Feb. 2	2	Oral argument on ret. of order to show cause why a writ of habeas corpus should not issue, etc. Submitted.
Apr. 28	28	Filed letter and copies of papers indicating recent motion to vacate in State Court.
1977		
June 23	23	Filed Decision & Order denying the application for a writ of habeas corpus. Certification of probable cause is also denied-Curtin, DJ Notice & copies to Philip Abramowitz & Louis J. Lefkowitz F-18
23	23	JS 6 made
27	27	Filed order granting certificate of probable cause-Curtin, DJ Notice & copies to Philip Abramowitz & Louis J. Lefkowitz F-18
July 18	18	" Petitioner's Notice of Appeal (copy mailed to Mr. Lefkowitz and to Clerk, CCA with copy of docket entries; CCA's Forms C and D mailed to Mr. Abramowitz)

CLOSED

appeal

Opinion of District Court.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

LEONARD FAMBO

Petitioner

-vs-

Civ-76-4

HAROLD J. SMITH, Superintendent
Attica Correctional Facility

Respondent

APPEARANCES: PHILIP B. ABRAMOWITZ, ESQ.
Buffalo, New York, for Petitioner.

LOUIS J. LEFKOWITZ, ESQ., Attorney General
of the State of New York (JAMES L. KENNEDY,
ESQ., of Counsel), Buffalo, New York, for
Respondent.

Petitioner Leonard Fambo has applied to this court for a writ of habeas corpus pursuant to 28 U.S.C. §2254. Petitioner was indicted, along with two others, in the Onondaga County Court in April 1971, for two violations of former §265.05(7) of the New York Penal Law. Former §265.05(7) (now recodified as §265.04) provided that "any person who has in his possession any explosive substance with intent to use the same unlawfully against the person or property of another . . . is guilty of a class B felony"

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(McKinney's 1967). The first count of the indictment charged the petitioner with possession of an explosive substance on November 29, 1970. The second count charged him with an identical violation on December 1, 1970.

At his arraignment in May 1971, petitioner entered a plea of not guilty to the crimes charged in the indictment. However, on October 27, 1972, following a conference among the petitioner, his attorney, the Onondaga County Assistant District Attorney, and the Hon. Ormond N. Gale, Onondaga County Court Judge, petitioner entered a plea of guilty for possession of an incendiary device in violation of former §265.05(1) of the Penal Law, in satisfaction of both original charges. Former §265.05(1) [now recodified as §265.02(2)] provided that "any person who has in his possession any explosive or incendiary bomb . . . is guilty of a class D felony" (McKinney's 1967).

Judge Gale accepted the guilty plea and petitioner was subsequently sentenced on December 27, 1972 to an indeterminate term of imprisonment, the maximum of which was to be five years. Petitioner is currently on parole under the supervision of the New York State Department of Correctional

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Services.

Petitioner did not appeal his conviction. He exhausted his state post-conviction remedies subsequent to filing his petition for relief in this court. Petitioner's motion to set aside his guilty plea, pursuant to New York's Criminal Procedure Law §440.10, was denied by Judge Gale on March 10, 1976. Leave to appeal that order was denied on April 6, 1976 by Associate Justice Walter J. Mahoney, Supreme Court, Appellate Division, Fourth Department.

Petitioner asserts that he has been deprived of his liberty in violation of the fourth, sixth, eighth and fourteenth amendments to the United States Constitution. He presents certain facts which allegedly were unknown to him at the time he pleaded guilty, and of which he did not learn until March 27, 1974, in an unrelated trial before this court in which petitioner was a defendant and in which he was acquitted on all counts. See United States of America v. Bufalino, CR-1973-175 (W.D.N.Y. 1974). Specifically, petitioner alleges that during the course of the Bufalino trial, a member of the Onondaga County Sheriff's Department,

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Sergeant David A. Stevenson, testified that, on November 29, 1970, a tube of dynamite was found in a field in Onondaga County; that the contents of the tube were removed and destroyed and that the tube was repacked with sawdust and returned on December 1, 1970 to the place where it had been discovered. See United States v. Bufalino, supra, Testimony of David Stevenson, 3/27/74, Trial Transcript at 55, 56, 61. Petitioner asserts that this tube of dynamite is the exact same explosive substance and/or incendiary device for which he was charged with criminal possession. Respondent's memorandum of law concedes the truth of this allegation. See Respondent's Memorandum of Law at 4.

Petitioner argues further that his plea of guilty was entered without knowledge of this apparently exculpatory evidence and that his plea of guilty therefore does not meet the constitutional requirement that the plea be voluntarily, intelligently and knowingly entered. See Machibroda v. United States, 368 U.S. 487 (1962). Petitioner alleges that the Assistant District Attorney of Onondaga County failed to disclose this exculpatory information to anyone at the

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time of the plea, and that he represented to the petitioner at that time that his office did in fact have the dynamite on which the two counts in the indictment were based. Petitioner and his trial counsel, Mr. Salten Rodenberg, have asserted that the guilty plea was produced directly as a result of the prosecutor's failure to disclose the fact that the district attorney's office did not have the dynamite which petitioner had originally been charged with possessing and which had been destroyed prior to petitioner's arrest, and the concomitant failure to disclose the fact that the substance possessed on the date charged in the second count of the indictment was merely sawdust.

Respondent disputes these claims by petitioner and contends that the prosecutor had no duty in this case to disclose this evidence prior to or during the course of plea bargaining.

Finally, petitioner claims that the facts of this case are logically inconsistent with the valid establishment of factual guilt and that he was convicted, sentenced and is, in effect, presently being deprived of his liberty merely for possession of sawdust.

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Prior to accepting the petitioner's guilty plea, the trial judge questioned petitioner under oath. Petitioner testified that he was aware that the maximum possible sentence for the D felony of possession of an incendiary device was seven years in prison, and that on the recommendation of the District Attorney the sentence imposed, based upon his conviction following his guilty plea,, would not exceed five years. Petitioner indicated on the record that he understood that the guilty plea would constitute a waiver of his right to a trial by jury. He also acknowledged that he had conferred at length with his counsel prior to the plea proceedings. See People of the State of New York v. Leonard Fambo, Ind. No. 71-142, Transcript of Plea Proceeding (10/27/72) at 1-3.

The trial court did not explore on the record the proof of the crimes charged that was available to the District Attorney, nor did the court establish a factual basis for the guilty plea since such was not required by New York State law. [See People v. Griffin, 7 N.Y.2d 511, 190 N.Y.S. 2d 674 (1960); People v. Clairborne, 29 N.Y.2d 950, 329 N.Y.S.2d 530 (1972). Cf. Federal Rules of Criminal Procedure,

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Rule 11.)^{1/} Nor did the trial court make an on-the-record attempt to satisfy itself that the defendant understood the nature of the charges or that the defendant was aware of the acts sufficient to constitute the offenses for which he was charged [see Boykin v. Alabama, 395 U.S. 238, 244, n.7 (1969)], other than to assure itself that petitioner had conferred at length with counsel on this matter. None of these matters were explored further at the sentencing proceeding.

On the record of the plea and sentencing proceedings alone, it would appear that petitioner's decision to plead guilty was a willing and voluntary choice made by petitioner from among alternative courses of action. Petitioner was represented throughout the proceedings by competent counsel. The record contains no evidence of coercion. Petitioner knew what his maximum punishment might be and he indicated that he was aware that he was waiving his right to a trial by jury.

In light of these facts, the principal question yet to be resolved is whether or not the District Attorney's failure to disclose to petitioner that the damaging evidence

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(i.e., the dynamite) had previously been destroyed renders petitioner's subsequent guilty plea constitutionally invalid under the standards which require that a guilty plea be entered in a voluntary, knowing and intelligent manner. See Machibroda v. United States, *supra*; Boykin v. Alabama, *supra*, at 242-44 (1969); Saddler v. United States, 531 F.2d 83 (2d Cir. 1976); Ferguson v. United States, 513 F.2d 1011 (2d Cir. 1975); Irizarry v. United States, 508 F.2d 960 (2d Cir. 1974); United States ex rel. Curtis v. Zelker, 466 F.2d 1092 (2d Cir. 1972); United States v. Malcolm, 432 F.2d 809 (2d Cir. 1970).

Before exploring the relationship between the District Attorney's failure to disclose important evidence and the validity of petitioner's guilty plea, it is appropriate initially to address the question of whether petitioner's guilty plea to the felony charge entered in Onondaga County Court in 1972 now precludes him from raising his constitutional claims in this federal habeas corpus proceeding. In a series of cases beginning with Brady v. United States, 397 U.S. 742 (1970), the United States Supreme Court has recognized that by pleading guilty the

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defendant waives the right to later assert that certain constitutional or factual infirmities which existed in his case prior to his plea now require that the conviction be overturned. See also McMann v. Richardson, 397 U.S. 759 (1970); Parker v. North Carolina, 397 U.S. 790 (1970); Tollett v. Henderson, 411 U.S. 258 (1973).

More recently, the Supreme Court has offered some guidance as to when it is appropriate to apply the rulings of these cases:

Neither Tollett v. Henderson, [citations omitted], nor our earlier cases on which it relied, e.g., Brady v. United States [citations omitted], and McMann v. Richardson [citations omitted], stand for the proposition that counseled guilty pleas inevitably "waive" all antecedent constitutional violations. . . . The point of these cases is that a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient basis for the State's imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly

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established.

Menna v. New York, 423 U.S. 61, 62-63,
n.2 (1975). [Emphasis added.]

As with the case before me, the cases of the Brady trilogy and Tollett v. Henderson all dealt with efforts by defendants to withdraw guilty pleas years after conviction. However, in those Supreme Court decisions it was determined that the guilty pleas were perfectly valid when initially entered. These cases do not foreclose inquiry into the nature of petitioner's guilty plea here. Since petitioner's claim is that his plea of guilty was not valid when entered into because it was not voluntary, knowing and intelligent, the Brady trilogy and Tollett v. Henderson do not act as a bar to consideration of petitioner's claims in this proceeding.

A guilty plea is "a grave and solemn act to be accepted only with care and discernment" because "the plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial." Brady v. United States, supra, at 743. Not only does a guilty plea constitute a waiver of the fundamental right to a jury trial [see Duncan v. Louisiana,

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391 U.S. 145 (1969)], but such action by a defendant also constitutes a waiver of one's right to remain silent [Malloy v. Hogan, 378 U.S. 1 (1964)], to confront one's accusers [Pointer v. Texas, 380 U.S. 400 (1965)], to present witnesses in one's defense [Washington v. Texas, 388 U.S. 14 (1967)], and to be convicted by proof beyond all reasonable doubt [In re Winship, 397 U.S. 358 (1970)].

Since Kercheval v. United States, 274 U.S. 220 (1927), the Supreme Court has recognized that "unfairly obtained" guilty pleas in the federal courts ought to be vacated. In Boykin v. Alabama, supra, the Supreme Court recognized that the question of whether a guilty plea, entered in a state court, is voluntary, knowing and intelligent involves federal constitutional rights and is governed by federal standards. For the waiver which a guilty plea represents to be valid under the Due Process Clause, it must be "an intentional relinquishment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

The test for determining the validity of a guilty plea has been succinctly summarized in North Carolina v. Alford, 400 U.S. 25, 31 (1970):

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The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.

See also Saddler v. United States, supra; United States ex rel. Curtis v. Zelker, supra; Warren v. Hogan, 373 F.Supp. 1241 (S.D.N.Y. 1974). A guilty plea may not stand if it is induced by threats, misrepresentation, or improper promises. See Brady v. United States, supra, at 755, citing with approval Judge Tuttle's decision in Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957), rev'd, 356 U.S. 26 (1958). The plea must be entered by a defendant who understands the situation and who has been neither deceived nor coerced. Schnautz v. Beto, 416 F.2d 214, 216 (5th Cir. 1969). A guilty plea may not be the product of incomprehension on the part of the defendant (Boykin v. Alabama, supra, at 243). A guilty plea which is "the tainted product of ignorance" is also void. United States v. Malcolm, 432 F.2d 809, 811 (2d Cir. 1970). All relevant circumstances surrounding the plea must be considered in determining whether it was voluntary, knowing and intelligent in nature. See Brady v. United States, supra; United States ex rel. McArthur v. Rundle, 402 F.2d 701, 708

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(3d Cir. 1968).

Petitioner relies primarily on the revelations of the testimony of Sergeant Stevenson in the Bufalino trial, as previously recounted, to support his claim before this court. Petitioner's trial counsel concurs in petitioner's affidavit and has stated further that his former client's decision to plead guilty in Onondaga County Court was based on their mutual belief that dynamite was in fact present in the contested tube.

The respondent in this action has failed to controvert any of these statements made by petitioner or his trial counsel.

The record of the Bufalino trial supports petitioner's allegation and belief that the "explosive substance," which petitioner was charged with possessing, and the "incendiary device," which petitioner pleaded guilty to possessing, were in fact a single tube of sawdust which Sergeant Stevenson testified he had replaced under a rock in a field in Onondaga County. As previously indicated, respondent concedes the truth of this allegation. Nor has respondent urged in this action that the contested tube

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contained anything other than sawdust as petitioner alleges, an allegation that the Bufalino record supports.^{2/}

The final substantial factual dispute relates to the nature of certain information that the Assistant District Attorney allegedly made available to petitioner before petitioner entered his guilty plea. By his affidavit referred to above, petitioner's trial counsel has stated that, prior to entering the guilty plea, a conference of substantial length was held among all the attorneys, the District Attorney of Onondaga County, County Court Judge Ormond N. Gale and the defendant in that matter.

Petitioner's trial counsel has stated in his affidavit before this court:

At that conference the District Attorney made sure that it was clearly understood by all the conferees that the District Attorney did, in fact, have the dynamite, which was mentioned in Counts I and II of the Indictment.

(Affidavit of Salten Rodenberg, 1/16/76.)

Respondent has not controverted this claim by petitioner's trial counsel made here. However, Chief Assistant District Attorney Shannon, in his affidavit in opposition to defendant's C.P.L. §440.10 motion, has stated that "the factual

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basis of the indictment was not discussed in detail and deponent did not make any specific statements regarding the presence of dynamite." (Affidavit of John M. Shannon, 2/24/76.) Mr. Shannon's affidavit is before the court as part of the record in this habeas corpus action.

Based on counsels' affidavits, I find that the Assistant District Attorney did not positively represent to petitioner or his attorney that he did in fact have the contested dynamite in his possession at the time that the guilty plea was entered.

Since the essential factual allegations are either not contested here, or have been resolved for the purposes of this decision, a further evidentiary hearing is not warranted before reaching a decision in this matter. See generally Townsend v. Sane, 372 U.S. 293 (1963). In addition, petitioner has not requested that the court hold such an evidentiary hearing.

I conclude on this record that petitioner has satisfied the requirement that he demonstrate that "substantial objective proof" exists which supports his claim that the contested dynamite had been destroyed on or after November 29, 1970 and that sawdust had been substituted in the

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contested tube on November 29, 1970, and that, at the time he entered his guilty plea, petitioner was unaware of this fact. See United States ex rel. Curtis v. Zelker, *supra*, at 1098; United States ex rel. Oliver v. Vincent, 498 F.2d 340 (2d Cir. 1974); Mosher v. LaVallee, 491 F.2d 1346, 1348 (2d Cir.), *cert. denied*, 416 U.S. 906 (1974); United States ex rel. LaFay v. Fritz, 455 F.2d 297 (2d Cir.), *cert. denied*, 407 U.S. 923 (1972); United States ex rel. Scott v. Mancusi, 429 F.2d 104 (2d Cir. 1970), *cert. denied*, 402 U.S. 909 (1971).

The next question is whether or not the Assistant District Attorney had an affirmative obligation to divulge evidence which was exculpatory of certain elements of the second count of the original indictment and, if so, whether such failure by the Assistant District Attorney to fulfill this obligation was a crucial factor which would require the writ to issue in this case.

Relying on Brady v. Maryland, 373 U.S. 83 (1963), and its progeny, petitioner argues that, under the circumstances of this case, the prosecutor had an affirmative duty to disclose any clearly exculpatory evidence to the

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defense counsel. See also Giles v. Maryland, 386 U.S. 66 (1967); Moore v. Illinois, 408 U.S. 786 (1972).

In this case there can be no question that the evidence (the fact that the contested tube actually contained sawdust rather than dynamite at the time that the petitioner was apprehended) was of a favorable character to the defense and was of a material nature as well. However, petitioner's counsel made no production request at any time during the state proceedings, nor was a request made for discovery of the grand jury minutes which might have indicated whether there was sufficient evidence for the indictment.

In United States ex rel. Meers v. Wilkins, 326 F.2d 135 (2d Cir. 1964), the Second Circuit Court of Appeals found itself confronted with a case that differed from Brady v. Maryland, *supra*, in that Meers' defense counsel had never requested the disclosure of evidence from the prosecution. In that case the court recognized that "such request is not a sine qua non to establish a duty on the prosecution's part." 326 F.2d at 137, *et seq.* (and cases cited therein). In United States v. Keogh, 391 F.2d 138

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(2d Cir. 1968), the Second Circuit recognized that a prosecutor is bound to disclose to an accused "evidence whose high value to the defense could not have escaped the prosecutor's attention." 391 F.2d at 147 (and cases cited therein). The court classified suppression by the prosecutor under such circumstances as "deliberate." The court also recognized that, even where suppression was not deliberate, in the sense indicated above, and where no request for disclosure had been made by the defense, "but where hindsight discloses that the defense could have put the evidence to not insignificant use," relief may be granted in such cases where the evidence is highly material. Id. at 147. Evaluating the nature of the evidence which the district attorney failed to make available to the accused in this case, it is obvious that this evidence would have been helpful to the petitioner in establishing a defense to certain elements of the crime which he was charged with committing on December 1, 1970.

More recently, in the context of a claim that a prosecutor's non-disclosure resulted in a denial of the defendant's right to a fair trial, the United States Supreme

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Court has recognized that

if the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made. . . . [T]here is no significant difference between cases in which there has been merely a general request for exculpatory matter and cases . . . in which there has been no request at all.

United States v. Agurs, 427 U.S. 97, 107 (1976).

Since this new ruling is clearly designed to enhance the reliability of the guilt determination process, there are strong reasons arguing for retroactive application of the principle articulated in Agurs. See Stovall v. Denno, 388 U.S. 293, 298 (1967); Desist v. United States, 394 U.S. 244, 249 (1969). While I find the reasoning of the Supreme Court to be most persuasive and applicable to the facts of the case before me, I need not resolve the issue of its retroactive application here since the decisions of the Second Circuit referred to above lead me to conclude that the prosecutor should have disclosed the exculpatory evidence to the defense under the circumstances presented by this case since the "evidence" (or the lack thereof) was supportive of a claim of innocence to the original charge

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in the second count of the indictment.

Brady v. Maryland, Mears, Keogh, and Agurs, supra, are all founded on the recognition that an accused is guaranteed certain due process protection and the right to a fair trial. Had there been a trial and convictions on the original charges in the case before me, it is obvious that under these Second Circuit opinions and the Agurs case, the prosecutor's failure to disclose such favorable evidence would have resulted in violations of petitioner's constitutional rights to due process and fair trial. Upon his arrest, petitioner pled not guilty, thereby invoking his right to a fair trial and to the other constitutional safeguards consistent with the fair trial guarantee. He did not change his plea until the matter had proceeded to the point that trial was imminent. During the period that petitioner was preparing for trial, plea bargaining was engaged in, as evidenced by the guilty plea that was finally entered on the very day that petitioner's case was scheduled to go to trial. [During that period of plea negotiation and trial preparation, petitioner and his defense counsel were without the benefit of the knowledge

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that, prior to petitioner's arrest, sawdust had been substituted for the explosive material which petitioner was subsequently charged with having possessed on December 1, 1970.

A majority of criminal convictions in this court, and in the other federal and state courts as well, are based on guilty pleas. See, e.g., Note, "Plea Bargaining and the Transformation of the Criminal Process," 90 HARV. L.REV. 564 (1977). Plea bargaining has long been a widespread and entrenched practice in our criminal justice system. See Comment, "The Plea Bargain in Historical Perspective," 23 BUFFALO L.REV., 499 (1974). The United States Supreme Court has recognized that plea bargaining

is an essential component of the administration of justice. Properly administered, it is to be encouraged. . . .

Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons.

Santobello v. New York, 404 U.S. 257, 260-61 (1971).

By agreeing to accept a bargained-for plea, the prosecutor saves the state the expense of a trial and arranges for

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the prompt, efficient and usually final disposition of most criminal cases. As the facts of this case demonstrate, by choosing to enter a bargained-for plea, a defendant will often gain the advantage of having multiple charges effaced and will avoid the possibility of a more severe sentence should he go to trial.

However, as the Supreme Court has recognized, the benefits that accrue to both the state and to the accused "presuppose fairness in securing agreement between an accused and a prosecutor." Santobello v. New York, *supra*, at 261. As is the case with all guilty pleas, those that are a result of the plea bargaining process are to be accorded considerable solicitude by the courts. Boykin v. Alabama, *supra*, at 243-4. This method for obtaining conviction "is no more foolproof than full trials to the court or to the jury. Accordingly, [courts] take great precautions against unsound results, and we should continue to do so, whether conviction is by plea or by trial." Brady v. United States, *supra*, at 758.

It must be assumed that, during the course of plea negotiations, the Assistant District Attorney knew that

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the dynamite had been destroyed and that it had been replaced by sawdust. Early in this case, law enforcement authorities knew that a substance, which the defendant believed to be dynamite but which was in fact merely sawdust, had been substituted in a tube that was eventually confiscated while in petitioner's possession. This is not the case where one con-man or criminal has hoodwinked a cohort. In this instance law enforcement officers themselves have acknowledged that they were responsible for substituting an innocuous substance for a volatile material. Law enforcement officials were thus aware from the outset that it was impossible for the petitioner in this case to commit the crime proscribed by former §265.05(7) of the New York Penal Law, the original crime charged, on December 1, 1970. The staff of the prosecution, including law enforcement and investigative personnel, must be seen as a unit for purposes of this case and it must be assumed that the Assistant District Attorney was aware of the surveillance and investigative efforts of the sheriff's office.

In addition, results of the laboratory test which were forwarded to the Assistant District Attorney on the

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day before the plea was entered into put the prosecutor on clear notice that the contested tube did not contain only dynamite, but that it contained wood shavings as well. At the very least, the Assistant District Attorney had a responsibility to bring these facts to the attention of the trial judge who accepted petitioner's plea. Such action would have put the trial court on actual notice as to the facts of this case and would have allowed the prosecutor to secure a ruling as to his duty to the defendant under the circumstances. The prosecutor's unilateral decision not to disclose this favorable and material evidence to the petitioner invited the risk of error.

Application of Kapatos, 208 F.Supp. 983, 988 (S.D.N.Y. 1962).

In order to maintain the integrity of the plea bargaining process and to assure that a guilty plea entered by a defendant is done so voluntarily, knowingly and intelligently, a prosecutor has a duty, during the course of plea bargaining, to disclose to the defendant evidence that is as clearly exculpatory of certain elements of the crime charged as is the contested evidence in this case.

Opinion of District Court.

Such favorable and material evidence must be made available to defense counsel so that he in turn can provide his client with competent, informed advice as to the course of action he should follow. See McMann v. Richardson, supra, at 771; Tollett v. Henderson, supra, at 266-67. Without such evidence before it, the trial court which accepted the plea could not, in fact, satisfy itself in any meaningful sense that petitioner's guilty plea was voluntarily and intelligently made by an informed defendant with adequate advice of counsel, and that there was nothing to question the accuracy and reliability of this defendant's admission that he had committed the crime with which he had been charged. See Brady v. United States, supra, at 758.

The final issue to be addressed is whether in fact the petitioner has been harmed by the prosecutor's failure to disclose the contested evidence, that is, whether substantial rights of the defendant have been impaired by the prosecutor's omission. If the constitutional error committed in this case can be classified as harmless beyond a reasonable doubt [see Chapman v. California, 386 U.S. 18 (1967)], then the writ should not issue.

Opinion of District Court.

In addition to being charged with a violation of former §265.05(7) of the New York Penal Law on December 1, 1970, at a time when I have found that the device could not be classified as an "explosive device," petitioner was also charged with an identical violation that allegedly occurred on November 29, 1970, which was a time when, based on the evidence before me, the tube did contain dynamite and was in fact an explosive device which would satisfy the requirements of former Penal Law §265.05(7). By relying on the Bufalino trial testimony of Sergeant Stevenson that dynamite was removed from the contested tube on November 29, 1970, petitioner, at least by implication, acknowledges that dynamite was in fact in the contested tube on November 29, 1970 and before that date. At this proceeding, petitioner has failed to offer any proof that the first count of the indictment was a baseless charge or to otherwise impugn the grand jury decision that there was probable cause for indicting the petitioner for this violation. Whether there was sufficient evidence to convict the petitioner for this violation had the matter proceeded to trial is not a question before this court.

Opinion of District Court.

While it is clear that petitioner could not have been convicted for violating former Penal Law §265.05(7) on December 1, 1970, the second count of the indictment, there has been no showing that petitioner might not have been convicted for violating former Penal Law §265.05(7) on November 29, 1970, the first count of the indictment. In addition, it is well established that even where a defendant may not be convicted for the substantive offense because of factual impossibility, a defendant could still be convicted of attempting that substantive offense. See New York Penal Law §110.10; United States v. Heng Awkak Roman, 356 F.Supp. 434 (S.D.N.Y.), aff'd, 434 F.2d 1271 (2d Cir. 1973), cert. denied, 415 U.S. 979 (1974); California v. Rojas, 55 Cal.2d 252, 10 Cal.Rptr.465, 358 P.2d 921 (1961).

The decision to remove and destroy the dynamite was a wise one under the circumstances of this case. Such action avoided unnecessary risks and potentially dire consequences that might have ensued for both law enforcement officials and for the petitioner alike had the authorities left the tube undisturbed.

Opinion of District Court.

While the People would still have had to prove the element of intent in order to gain a conviction for attempt to violate former Penal Law §265.05(7) (under Count II of the original indictment), there is nothing presently in the record that demonstrates that the People could not have proven such intent. Proof of attempt to commit the crime charged in the original indictment would constitute a C felony. The charge that petitioner eventually pleaded guilty to was a D felony, one degree of felony lower. Faced with the two B felony charges (one of which could only have been proven, at most, to be a C felony had the matter gone to trial), petitioner chose to forego his right to trial and to avoid the possibility of conviction of multiple charges with lengthy prison sentences, by pleading guilty to a single D felony with an agreed-to maximum term of five years' incarceration. Conviction on B felony charges could have resulted in a maximum prison term not in excess of 25 years (assuming that the court imposed concurrent terms). A C felony conviction would have carried a maximum term of 15 years' incarceration. Petitioner does not allege that he did not get what he bargained

Opinion of District Court.

for and the record clearly supports the conclusion that he did realize his expectations. By pleading guilty, petitioner avoided the possibility of a more severe sentence at trial. See United States ex rel. Burke v. Mancusi, 453 F.2d 563, 565 (2d Cir. 1971), cert. denied, 406 U.S. 925 (1972); United States ex rel. Holes v. Mancusi, 423 F.2d 1137, 1142 (2d Cir. 1970); United States ex rel. Amuso v. LaVallee, 291 F.Supp. 383, 385 (E.D.N.Y. 1968), aff'd, 427 F.2d 328 (2d Cir. 1970). Petitioner also gained the advantage of having multiple charges effaced in favor of his plea to a lesser degree of felony. See Martin v. Coiner, 299 F.Supp. 553, 556 (S.D.W.Va. 1969).

The record before me indicates that there was thus sufficient mutuality of advantage to support this bargain as being reasonable and fair, after the fact, even though the Assistant District Attorney's failure to disclose potentially exculpatory evidence was an omission of constitutional proportions and is subject to censure as a bargaining tactic. In retrospect, petitioner's decision to plead guilty to a D felony, with assurances that a maximum term of five years' imprisonment would be imposed, was

Opinion of District Court.

still a voluntary and intelligent, if not properly informed, choice among the alternative courses of action open to him at the time the plea was entered. See North Carolina v. Alford, supra, at 31.

The application for a writ of habeas corpus is therefore denied in all respects.



JOHN T. CURTIN
United States District Judge

Opinion of District Court.

FOOTNOTES

1/

Respondent's reference to the New York rule that a bargained-for guilty plea to a lesser crime makes unnecessary a factual basis for the particular crime confessed (see People v. Griffin, supra; People v. Clairborne, supra), is not dispositive of the issue presented here. I do not find that New York State courts must follow the practice of the federal courts under the Federal Rules of Criminal Procedure, Rule 11 (see McCarthy v. United States, 394 U.S. 459 (1969)), and establish on the record that a factual basis for the guilty plea exists, although the facts of this case demonstrate the usefulness of such a requirement. (Cf., Comment, 59 CALIF. L.REV. 962, 931 (1971), which suggests that Brady v. United States, supra, and Boykin v. Alabama, supra, give the factual basis requirement a constitutional dimension.)

2/

However, a laboratory report submitted with the affidavit of John M. Shannon, Chief Assistant District Attorney for Onondaga County, in opposition to defendant's CPL §440.10 motion, indicates that, in fact, an undetermined amount of nitroglycerine was found in the tube as well as a quantity of wood shavings. That report indicates that the contents of the contested tube were analyzed by the Syracuse Police Department Crime Laboratory and that the contents of the tube were found to consist of wood shavings and brown, dried chunks and yellow particles. The report, submitted on October 26, 1972 concluded that "nitroglycerine was detected in the brown chunks inside the cardboard tube. Nitroglycerine is explosive. The lower portion of the tube was packed with wood shavings and small metal caps."

I find this report to be, at best, inconclusive and uninformative. The general observation that "nitroglycerine is explosive" is one of common knowledge and sheds no light on the problem of whether or not this tube, packed with sawdust and some particles of nitroglycerine and sulphur, could be classified as an

Opinion of District Court.

explosive or an incendiary device. LABOR LAW §451 (McKinney's Supp. 1976), and VEHICLE AND TRAFFIC LAW §115 (McKinney's 1970) define "explosives" to require a sufficient quantity of the designated material to in fact cause an explosion. This laboratory report is of no aid to the court in resolving this factual dispute. Since the device testified to by Sergeant Stevenson in the Bufalino trial was the same device, possession of which petitioner pleaded guilty to, I rely on Sergeant Stevenson's sworn testimony in the Bufalino case and I find that the dynamite was, in fact, removed from the contested tube on November 29, 1970, was subsequently destroyed and was replaced with sawdust by Sergeant Stevenson.

Petition for a Writ of Habeas Corpus.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

LEONARD FAMBO

Petitioner

-vs-

HAROLD R. SMITH, Superintendent
Attica Correctional Facility

Respondent

CIV - 76 - 4

PETITION FOR A WRIT
OF HABEAS CORPUS

LEONARD FAMBO, through his attorney, PHILIP B. ABRAMOWITZ,
respectfully alleges for his Petition for a Writ of Habeas Corpus:

1. Petitioner is presently serving a sentence of five (5) years
for possession of an incendiary device which was imposed on or about
December 27, 1972 by the Onondaga County Court.

2. Petitioner is presently incarcerated in the Attica Correctional
Facility and is in the custody and control of the Respondent, HAROLD R.
SMITH.

3. The plea of guilty on or about October 27, 197²~~x~~ and sentence
pursuant to which the Petitioner is being detained was imposed in
violation of the Fourth, Sixth, Eighth and Fourteenth Amendments to the
Constitution of the United States. The facts showing this Constitutional
violation are as follows:

A. In 1971, the Petitioner was indicted by an Onondaga
County Grand Jury in a two count indictment charging in the first count
a violation of §265.05(7) of the Penal Law in that he allegedly possessed

Petition for a Writ of Habeas Corpus.

an explosive substance on November 29, 1970 in the second count, possession of an explosive substance in violation of §265.05(7) of the Penal Law in that he allegedly possessed an explosive substance on December 1, 1970.

B. On or about October 27, 1972, Petitioner pleaded guilty to the crime of possession of an incendiary device on December 1, 1970 (a lesser included offense of the second count of the indictment).

C. Unknown to Petitioner at the time he pleaded guilty to possession of the incendiary device on December 1, 1970 were certain facts which he learned only on March 27, 1974 in a trial conducted in the United States District Court for the Western District of New York, United States of America vs. Rosario A. Bufalino, et al., in which Petitioner was a Defendant, and on which he was acquitted of all counts.

D. In that trial, a member of the Onondaga County Sheriff's Department, David A. Stevenson, testified under oath that dynamite had been found in a field in Onondaga County on or about November 29, 1975.

E. Sergeant Stevenson further testified that that dynamite was destroyed, that sawdust was placed in a tube and was "replaced under the rock in the same manner it had been found". (Attached hereto and made a part hereof is Petitioner's Exhibit A, a transcript of the testimony of David A. Stevenson of the Onondaga County Sheriff's Department.)

F. The "dynamite" which Petitioner was charged with possessing and the "incendiary device" which he pleaded guilty to possessing in a lesser included count is the exact same sawdust which the Sheriff testified he replaced under a rock in a field in Onondaga County.

Petition for a Writ of Habeas Corpus.

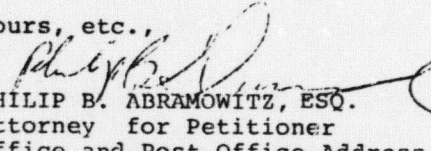
D G. Petitioner is thus being deprived of his liberty by
HAROLD R. SMITH for possessing sawdust.

D 4. It would be futile for Petitioner to exhaust his state
remedies personally because a co-defendant, Vincent Caci, who was charged
exactly as your Petitioner and who pleaded guilty in exactly the same
manner as your Petitioner already petitioned in the New York Courts for
a Writ of Coram Nobis and was denied relief in the Onondaga County Court
and then permission to appeal to the Appellate Division was denied by
an Appellate Division Justice.

5. The facts of this case are logically inconsistent with the
valid establishment of factual guilt.

WHEREFORE, it is respectfully requested that this Court issue
a Writ of Habeas Corpus ordering Respondent to discharge Petitioner
forthwith.

Yours, etc.,


PHILIP B. ABRAMOWITZ, ESQ.
Attorney for Petitioner
Office and Post Office Address
76 Niagara Street
Buffalo, New York 14202
Tel. No. (716) 855-0717

Testimony of David A. Stevenson.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-vs-

CR. 1973-175

ROSARIO A. BUFALINO, et al.,

Defendants.

Testimony of the Witness DAVID A. STEVENSON,
taken before the HON. JOHN T. CURTIN, United States District
Judge, and a Jury, in Part II, United States Court House,
Buffalo, New York, commencing on March 27, 1974.

APPEARANCES:

JOHN T. ELFVIN, Esq., United States
Attorney, by JOSEPH KIEL, Esq.,
MARTIN D. BOUDREAU, Esq., and JEFFREY
C. FISHER, Esq., Department of Justice,
Appearing on behalf of the Government.

WILFRED L. DAVIS, Esq., Appearing on
behalf of the Defendant Bufalino.

EDGAR C. NEMOYER, Esq., Appearing on
behalf of the Defendant Guarnieri.

ROBERT M. MURPHY, Esq., Appearing on
behalf of the Defendant Aleccia.

GEORGE CONATY, Esq., Appearing on
behalf of the Defendant Didio.

Testimony of David A. Stevenson.

MICHAEL R. McGEE, Esq., Appearing on
behalf of the Defendant Vinci.

SAMUEL DiGAETANO, Esq., Appearing on
behalf of the Defendant Barton.

THOMAS C. D'AGOSTINO, Esq., Appearing on
behalf of the Defendant Caci.

SALTEN RODENBERG, Esq., Appearing on
behalf of the Defendant Parbo.

HAROLD J. BOREANAZ, Esq., Appearing on
behalf of the Defendant Todaro.

PETER L. PARRINO, Esq., Appearing on
behalf of the Defendant Fashana.

ROBERT E. WALSH, Esq., Appearing on
behalf of the Defendant Russo.

WILLIAM COTTER, Esq., Appearing on
behalf of the Defendant Tribunella.

RICHARD GRISANTI, Esq., Appearing on
behalf of the Defendant Talerico.

Testimony of David A. Stevenson.

55

1 you found it, sir?

2 A. It was located partially under a flat rock that
3 measured about a foot in diameter and three or four
4 inches thick. The end of the tube had been broken
5 open from its normal state and was wrapped at the
6 end with black electrical tape.

7 Q. Now, can you tell us, sir, what happened to the
8 blasting caps that you recovered on that day, sir?

9 A. Those were destroyed with the dynamite.

10 MR. GRISANTI: Can we find out what day he is
11 talking about now? I understand there
12 are two different dates.

13 THE COURT: What date is this?

14 THE WITNESS: This all takes place on the same
15 day.

16 BY MR. KIEL:

17 Q. And that would have been --

18 A. The 29th.

19 Q. And how many blasting caps did you destroy on that
20 day, sir?

21 A. Two.

22 Q. Now, Sergeant, directing your attention, sir, to
23 December 1st of 1970, did you have occasion to again

Testimony of David A. Stevenson.

1 go to the premises of Syracuse Vending Company?

2 A Yes, I did.

3 Q And can you tell us approximately when that was?

4 A Approximately 9:15 in the evening.

5 Q And what, if anything, did you take with you at that
6 time, sir?

7 A The tube marked forty per cent special gelatin nitro,
8 reassembled to depict the same density and weight if
9 it had continued to hold the explosive that was
10 originally in it.

11 Q What was originally in that tube, sir?

12 A A form of commercial dynamite.

13 MR. D'AGOSTINO: Your Honor, I am going to object
14 to that. I know you have already
15 overruled it, but may I just say for
16 the record I have a continuing objection.

17 THE COURT: All right. I will overrule it.

18 BY MR. KIEL:

19 Q And, Sergeant, what became of the commercial explosive
20 that was in the tube originally?

21 A That was destroyed with the explosive that was
22 removed from the first package.

23 Q That is the bag device, let's call it?

Testimony of David A. Stevenson.

1 THE COURT: In order to bring out the story
2 we are not going to have any discussion
3 between any policemen as to what their
4 stratagems are. He is just going to
5 explain what they did, so Mr. Kiel, you
6 may continue.

7 BY MR. KIEL:

8 Q. Sergeant, can you tell us what, if anything, you did
9 with respect to the tube on December 1st, please?

10 A. It was withdrawn from the property room in the Public
11 Safety Building and reconstructed with sawdust and
12 spent 38 primer caps to depict the same weight and
13 density as the original tube would have.

14 Q. When you say "reconstructed", what do you mean?

15 A. The caps and the sawdust were placed in the tube and
16 packed in the tube.

17 MR. DAVIS: Your Honor, there is only one
18 thing that disturbs me. He says it was
19 withdrawn, as if it was done by someone
20 else. Was it done by him or by someone
21 else?

22 THE COURT: Do you know?

23 THE WITNESS: 43 Are you asking that question?

Testimony of David A. Stevenson.

1 THE COURT: Yes.

2 THE WITNESS: Yes, I removed it.

3 THE COURT: You did. If you did something,
4 please tell us. If somebody else did
5 it, identify them. All right.

6 BY MR. KIEL:

7 Q. And once having done what you did to this device, sir,
8 what did you then do?

9 A. We proceeded, - when I say "we", Sergeant Bratt and I
10 proceeded to a location off of Town Line Road where
11 the device had been located originally and it was
12 replaced under the rock in the same manner it had been
13 found.

14 Q. Now, this is the tube you are referring to?

15 A. That is correct.

16 Q. And can you tell us, please, what time of day it is
17 now?

18 A. Approximately 9:15 in the evening.

19 Q. And what did you do, sir, after placing this device
20 under the rock?

21 A. We took an assigned position approximately a hundred
22 feet to the southeast of that location.

23 Q. And can you tell us, please, who was with you at that

Answer of Respondent.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

LEONARD FANBO,

Petitioner, ANSWER

vs.

CIV-76-4

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility, Respondent.

Respondent, Harold J. Smith, as Superintendent of the Attica Correctional Facility, by his attorney, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, James L. Kennedy, Assistant Attorney General, of Counsel, answering the petition herein, alleges:

FIRST: ADMITS the allegations contained in paragraphs designated as 1 and 2 of the petition herein.

SECOND: DENIES the allegations contained in paragraphs designated as 4 and 5 of the petition herein.

THIRD: ADMITS and DENIES the allegations set forth in paragraph 3 of the petition as follows:

- a) Admits the allegations contained in paragraph designated as 3(A).
- b) Admits the allegations contained in paragraph designated as 3(B).
- c) Denies knowledge or information as to what petitioner knew or did not know at the time of his plea of guilty as set forth in paragraph designated as 3(C).
- d) Admits the allegations set forth in paragraph designated as 3(D).
- e) Admits the allegations set forth in paragraph designated as 3(E).
- f) Denies knowledge or information sufficient to form a belief as to those allegations set forth in paragraph designated as 3(F).
- g) Denies the allegations set forth in paragraph

Answer of Respondent.

designated as 3(G).

h) Denies each and every other allegation set forth in paragraph designated as 3 not heretofore admitted, qualified, controverted or denied.

FOURTH: DENIES each and every other allegation contained in the petition ~~not~~ heretofore admitted, controverted, qualified or denied.

AS AN AFFIRMATIVE DEFENSE:

FIFTH: That the petitioner was indicted by an Onondaga County Grand Jury in a two count indictment for Possession of an Explosive Device in violation of the Penal Law of the State of New York, §265.05(7).

SIXTH: That on or about October 27, 1972, the petitioner entered a plea of guilty to a reduced charge of Possession of an Incendiary Device in violation of §265.05(1) of the said Penal Law.

SEVENTH: That on or about December 27, 1972, petitioner was sentenced on his plea of guilty by the Onondaga County Court to a term of imprisonment not to exceed five (5) years at the Attica Correctional Facility.

EIGHTH: That petitioner is presently confined at the Attica Correctional Facility as a result of the aforesaid sentence and judgment of conviction.

NINTH: That by reason of the foregoing, the petitioner is in custody pursuant to the requirements of 28 U.S.C. §2254.

TENTH: That upon information and belief, petitioner did not appeal from the judgment of conviction.

ELEVENTH: That upon information and belief, the petitioner has made no attempt at post-conviction relief since the entry of the judgment of conviction herein.

TWELFTH: That petitioner has alleged in his petition to this Court (paragraph 4) that it would be futile to exhaust his

Answer of Respondent.

state remedies.

THIRTEENTH: That petitioner has, in fact, made no attempt to present the issues herein to the courts of New York State.

FOURTEENTH: That by reason of the foregoing, petitioner has failed to exhaust his available state remedies pursuant to 28 U.S.C. §2254.

AS A FURTHER DEFENSE:

FIFTEENTH: Repeats and realleges the matter hereinbefore as if here fully set forth.

SIXTEENTH: That the substance of the petitioner's cause of action alleged herein constitutes an attack on the sufficiency of the evidence underlying his conviction.

SEVENTEENTH: That petitioner's plea of guilty to the reduced charge herein foreclosed any right or entitlement he may have possessed to collaterally attack his conviction in the Onondaga County Court by way of federal habeas corpus.

EIGHTEENTH: That petitioner has failed to demonstrate in any adequate manner that his plea of guilty to the aforesaid reduced charge was not knowingly and intelligently made.

NINETEENTH: That by reason of the foregoing, petitioner has failed to state a cause of action upon which relief may be granted.

AS A FURTHER DEFENSE:

TWENTIETH: Repeats and realleges the matter hereinbefore as if here fully set forth.

TWENTY-FIRST: That upon information and belief, petitioner, prior to the entry of his plea of guilty herein, made no request to the Onondaga County Court to inspect the Grand Jury minutes herein.

TWENTY-SECOND: That by reason of the foregoing, petitioner has waived any right or entitlement he may have pos-

Answer of Respondent.

essed to collaterally attack the sufficiency of the indictment herein.

WHEREFORE, respondent respectfully requests that an Order be entered denying the petition in all respects.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent

By:


JAMES L. KENNEDY
Assistant Attorney General
of Counsel
Office & P. O. Address:
65 Court Street
Buffalo, New York 14202
Telephone: (716) 842-4390

Affidavit of Salten Rodenberg.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

LEONARD FAMBO

Petitioner

vs.

HAROLD J. SMITH, Superintendent
Attica Correctional Facility

Respondent

AFFIDAVIT

~~Indictment No.~~ 76-4

STATE OF NEW YORK)
COUNTY OF ERIE)ss.:
CITY OF BUFFALO)

SALTEN RODENBERG, being duly sworn, deposes and says:

FIRST: That I am an attorney at law duly admitted to practice in this Court in the Western District of New York.

SECOND: That I represented LEONARD FAMBO in 1972 relative to a case arising out of an Onondaga County Court Indictment, PEOPLE vs. VINCENT CACI, LEONARD FAMBO and PETER TALARICO, Indictment No. 71-142.

THIRD: That immediately prior to the plea by all the Defendants in that case, there was a conference of "substantial length" (see Page 2 of Pleas Minutes of Vincent Caci) among all the attorneys, the District Attorney of Onondaga, and Onondaga County Court Judge Ormond N. Gale. At that conference the District Attorney made sure that it was clearly understood by all the conferees that the District Attorney did, in fact, have the dynamite, which was mentioned in Counts I and II of the Indictment.

FOURTH: That this representation by the District Attorney was a very significant factor inducing my client to plead guilty.

FIFTH: That the decision of whether or not to plea guilty always rested solely with my client although I advised him that even with the dynamite in the case, I believed there was a good chance for an acquittal. I know that ~~this~~ ^{his} decision was

Affidavit of Salten Rodenberg.

based upon the information which I related to him as a result of the conference in chambers.

SIXTH: That it was not until over a year later, on March 27, 1974, that I found out that, infact, there was no dynamite that my client could have possessed under the Count that he pled guilty to.

Salten Rodenberg

Sworn to before me

this 16 day of January, 1976.

Philip A. [Signature]
Notary Public
E. P. [Signature]
My Comm. Exp. 12/31/76

Affidavit of Philip B. Abramowitz.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

LEONARD FAMBO

Petitioner

vs.

AFFIDAVIT

HAROLD J. SMITH

CIVIL NO. 76-4

Respondent

STATE OF NEW YORK)
COUNTY OF ERIE : SS
CITY OF BUFFALO)

PHILIP B. ABRAMOWITZ, being duly sworn, deposes and says:

(1) This case has its legal origins in the recent Supreme Court case of Menna v. New York, 96 S.Ct. 241, where the Supreme Court stated that none of its prior cases, including Tollett v. Henderson, 411 U.S. 258, "stand for the proposition that counselled guilty pleas inevitably 'waive' all antecedent constitutional violations." The Court said that a guilty plea usually could be considered to be a "reliable" indication of "factual guilt" unless it could be shown to be "logically inconsistent with...guilt" at 242.

(2) In this case, where the Defendant pleaded guilty to a charge that sworn testimony of two Onondaga County Sheriffs have shown to be "logically inconsistent with the valid establishment of factual guilt" Menna, supra at 242, it is respectfully submitted that this Court can properly review this case to determine whether or not the plea was obtained by a violation of the constitutional rights of the Defendant.

#5 51

MARTINIE COLLEGE AL. ABRAMOWITZ & GELER

Affidavit of Philip B. Abramowitz.

- 2 -

(3) It is clear from the Affidavit of Salten Rodenberg, Esq., who represented Leonard Fambo at the time of his plea, that the District Attorney never told any of the Defendants that, in fact, he did not have dynamite, but that the District Attorney "made sure that it was clearly understood by all the conferees that the District Attorney did, in fact, have the dynamite, which was mentioned in counts 1 and 2 of the indictment. See Affidavit of Salten Rodenberg dated January 16, 1976.

(4) At least at the time of the plea bargaining, when the attorneys were negotiating a plea on the basis of the relative merits of their cases, the prosecutor had an affirmative obligation to tell Mr. Rodenberg that his client was not in possession of dynamite on December 1971, and that in fact, the District Attorney had no dynamite to produce at trial. (See Giles v. Maryland, 386 U.S. 66 [102] where the Court said "A murder trial - indeed any criminal proceeding - is not a sporting event and Brady v. Maryland, supra).

(5) It is submitted that the District Attorney in hiding this critical piece of absence of evidence in his case is not complying with either the letter or the spirit of Brady and its progeny, and thus, this Court should permit Mr. Fambo to withdraw his plea of guilty, which was directly produced by the prosecutor's improper conduct.

(6) It is further submitted that Mr. Fambo is improperly incarcerated because under the doctrine of Thompson v. Louisville, 80 S.Ct. 624 and Robinson v. California, 370 U.S. 660, the Petitioner is in jail for committing an act - possessing sawdust - which could not possibly be a crime. See Robinson, supra, where the Supreme Court said "even one day

Affidavit of Philip B. Abramowitz.

prison would be cruel and unusual punishment for the crime of having a common cold" at 667, and Thompson, supra, where the Supreme Court said "it is a violation due process to convict and punish a man without evidence of his guilt." 362 U.S. at 206

(7) It is submitted that Petitioner is in jail on a record absolutely devoid of any proof of his guilt and further on a record on which the facts are "logically inconsistent" (Menna, supra) with his guilt.

(8) The Petitioner has effectively spent over three years in prison for the possession of sawdust, and the prosecutor never told his attorney about this. This is a clear denial of Petitioner's constitutional rights under Robinson, Thompson and Brady.

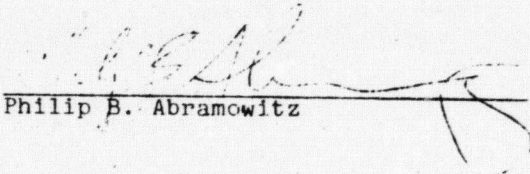
(9) Further, it is significant to note that the prosecutor at the guilty plea did not put forth any factual basis for the Defendant's guilt, yet under the Fifth Amendment testimony of his guilt must have been presented to a Grand Jury under oath in order for the State to have obtained an indictment.

(10) It is submitted that the only logical way in which an indictment could have been obtained in this case would have been through perjury.

(11) In Miller v. Pate, 386 U.S. 1, 7 the Supreme Court said "More than 30 years ago this Court held that the Fourteenth Amendment does not tolerate a State criminal conviction obtained by the knowing use of false evidence [citing cases]. There has been no deviation from that established principal [citing cases]. There can be no retreat from that principal here."

Affidavit of Philip B. Abramowitz.

(12) There can be no retreat from that principal in this case
either .


Philip B. Abramowitz

SWORN to before me this

11 day of January, 1976.


Robert D. Kolken

ROBERT D. KOLKEN
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1977

55

Order of Appellate Division.

LAW OFFICES
CLINTON HOUSE
556 FRANKLIN STREET
BUFFALO, NEW YORK 14202

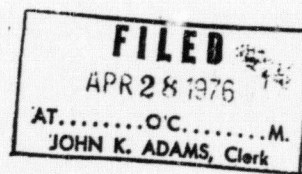
STANLEY J. COLLEBANO
JACK J. GELLER
ROBERT D. KOLKEN
ROBERT C. MACER

SALVATORE R. MARTOCHE
PHILIP B. ABRAMOWITZ
JAMES T. MCFARLAND
LINDA L. CLEVELAND

AREA CODE 716
883-5000

April 8, 1976

Honorable John T. Curtin
Chief Judge
United States District Court
Western District of New York
United States Court House
Buffalo, New York 14202



Re: FAMBO v. SMITH *Cr 76-4*

Dear Judge Curtin:

Enclosed please find an Order by the
Honorable Walter J. Mahoney indicating that all
state remedies have been exhausted in the above
case.

Very truly yours,

[Signature]
Philip B. Abramowitz

PBA/sg
Enclosure

cc: John Adams, Clerk
United States District Court
Western District of New York
United States Court House
Buffalo, New York 14202

Michael Wolfgang, Esq.
Assistant Attorney General
State of New York
65 Court Street
Buffalo, New York 14202

RECEIVED

1976

#9
55

56
Order of Appellate Division.
SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

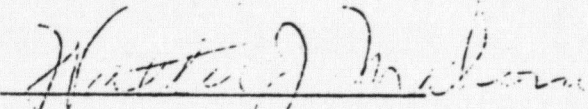
People of the State of New York,

v.

Leonard Fambo, Defendant.

I, Walter J. Mahoney, Associate Justice of the Appellate Division, Fourth Judicial Department, do hereby certify that, upon the application made on behalf of the above named defendant for a certificate granting leave to appeal pursuant to section 460.15 of the Criminal Procedure Law from an order of the Onondaga County Court entered in the Office of the Clerk of the County of Onondaga on March 10, 1976, there is no question of law or fact which ought to be reviewed by this court, and permission to appeal is hereby denied.

Dated: April 6, 1976


Associate Justice

Notice of Motion.

STATE OF NEW YORK
COUNTY COURT : COUNTY OF ONONDAGA

PEOPLE OF THE STATE OF NEW YORK

Plaintiff

-vs-

NOTICE OF MOTION

LEONARD FAMBO

Defendant

SIRS:

PLEASE TAKE NOTICE that upon the annexed Affidavit of PHILIP B. ABRAMOWITZ, ESQ., and SALTEN RODENBERG, ESQ., a Motion will be made before this Court on the ____ day of _____, 1976, requesting this Court to issue a Writ of Coram Nobis pursuant to §440.10 of the CPL on behalf of the Defendant, LEONARD FAMBO.

DATED: Buffalo, New York

Yours, etc.

MARTOCHE, COLLESANO, ABRAMOWITZ & GELLER
PHILIP B. ABRAMOWITZ, Of Counsel
Attorneys for Defendant
Office and Post Office Address
76 Niagara Street
Buffalo, New York 14202

TO: JON K. HOLCOMBE, ESQ.
District Attorney of Onondaga County
Onondaga County Court House - Room 408
Syracuse, New York

Notice of Motion.

STATE OF NEW YORK
COUNTY COURT : COUNTY OF ONONDAGA

PEOPLE OF THE STATE OF NEW YORK

Plaintiff

-vs-

LEONARD FAMBO

Defendant

AFFIDAVIT
INDICTMENT NO. 71-142
INDEX NO. 70/857

STATE OF NEW YORK)
COUNTY OF ERIE) SS.:
CITY OF BUFFALO)

PHILIP B. ABRAMOWITZ, being duly sworn, deposes and says:

1. That I am an attorney at law and I represent the Defendant in the above action, LEONARD FAMBO.

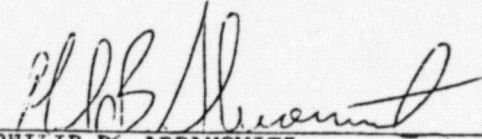
2. This Affidavit is submitted in support of a Motion asking this Court to grant a Writ of Error Coram Nobis pursuant to §440.10 of the Criminal Procedure Law to vacate a Judgment of Conviction rendered on or about October 27, 1972 and a sentence imposed thereon rendered on or about December 27, 1972 by this Court.

3. Incorporated by reference are all of the pleadings and proceedings which occurred before this Court in the Coram Nobis case of the Co-Defendant in this action, Vincent Caci on which an Order was entered on or about August 5, 1974 based upon a Memorandum written by this Court and dated July 31, 1974.

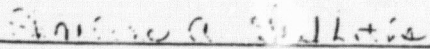
Notice of Motion.

4. It is submitted that the Defendant's rights have been violated under the 4th, 5th, 6th, 8th and 14th amendments to the Constitution of the United States.

WHEREFORE, it is respectfully requested that this Court grant relief pursuant to §440.10 of the Criminal Procedure Law and grant a Writ of Error in the above case.


 PHILIP-B. ABRAMOWITZ

Sworn to before me
 this 2nd day of
February, 1976.



CHARLENE A. GRIFFITHS — #4612660
 Notary Public, State of New York
 Qualified in Erie County
 My Commission Expires March 31, 1977

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

Notice of Motion.

LEONARD FAMBO

Petitioner

vs.

HAROLD J. SMITH, Superintendent
Attica Correctional Facility

Respondent

AFFIDAVIT

Indictment No. 76-4

STATE OF NEW YORK)
COUNTY OF ERIE)ss.:
CITY OF BUFFALO)

SALTEN RODENBERG, being duly sworn, deposes and says:

FIRST: That I am an attorney at law duly admitted to practice in this Court in the Western District of New York.

SECOND: That I represented LEONARD FAMBO in 1972 relative to a case arising out of an Onondaga County Court Indictment, PEOPLE vs. VINCENT CACI, LEONARD FAMBO and PETER TALARICO, Indictment No. 71-142.

THIRD: That immediately prior to the plea by all the Defendants in that case, there was a conference of "substantial length" (see Page 2 of Pleas Minutes of Vincent Caci) among all the attorneys, the District Attorney of Onondaga, and Onondaga County Court Judge Ormond N. Gale. At that conference the District Attorney made sure that it was clearly understood by all the conferees that the District Attorney did, in fact, have the dynamite, which was mentioned in Counts I and II of the Indictment.

FOURTH: That this representation by the District Attorney was a very significant factor inducing my client to plead guilty.

FIFTH: That the decision of whether or not to plea guilty always rested solely with my client although I advised him that even with the dynamite in the case, I believed there was a good chance for an acquittal. I know that this decision was

MARTOCHE, COLLESANO, ABRAMOWITZ & GELLER

25 Niagara Street • Buffalo, New York 14202 • (716) 855-0717

Notice of Motion.

based upon the information which I related to him as a result of the conference in chambers.

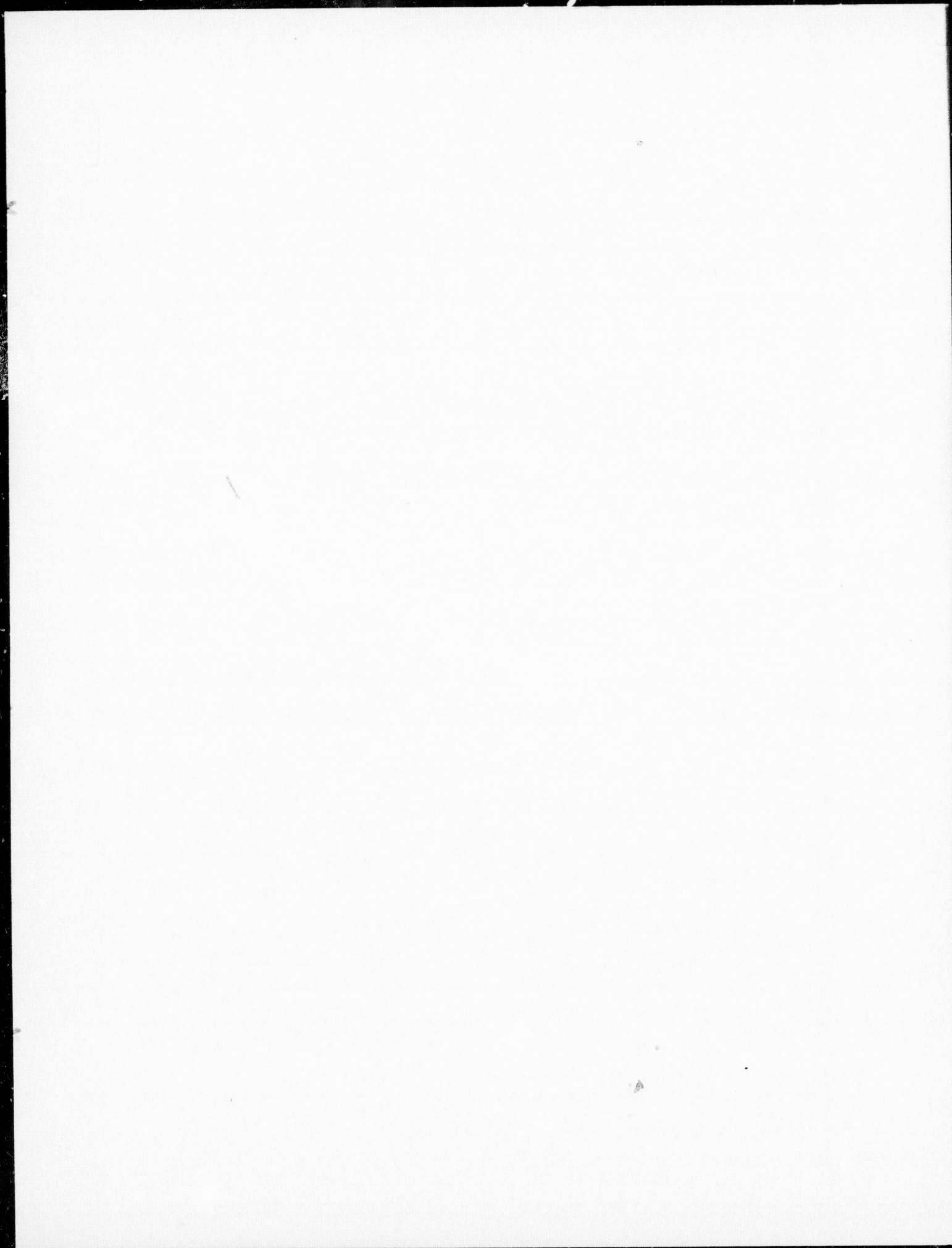
SIXTH: That it was not until over a year later, on March 27, 1974, that I found out that, infact, there was no dynamite that my client could have possessed under the Count that he pled guilty to.

s/ Salten Rodenberg
Salten Rodenberg

Sworn to before me
this 16 day of January, 1976.

s/ Philip Abramowitz

Certified accurate
Philip Abramowitz
Atty -



Affidavit of John M. Shannon.

COUNTY COURT

COUNTY OF ONONDAGA

THE PEOPLE OF THE STATE OF NEW YORK

v.

LEONARD FAMBO

(INDICTMENT NO.71-142)

INDEX #70/857(Criminal)

STATE OF NEW YORK)
COUNTY OF ONONDAGA) ss:

JOHN M. SHANNON, being duly sworn, deposes and says that he is Chief Assistant District Attorney in and for Onondaga County and as such submits this affidavit in opposition to defendant's motion pursuant to Criminal Procedure Law Section 440.10 to vacate his judgment of conviction.

The defendant's attorney in his instant motion contends that his client was induced by the representations of the District Attorney ("a very significant factor") that the District Attorney did, in fact, have the dynamite referred to in the first two counts of the indictment. However, the attorney alleges that over a year later he learned there was no dynamite that his client could have possessed under the count to which he pled guilty.

A review of the records of the District Attorney's office reveals that petitioner was indicted by the Onondaga County Grand Jury in 1971 on two counts of POSSESSION OF AN EXPLOSIVE SUBSTANCE in violation of Penal Law Section 265.05(7). On October 27, 1972 defendant, as the result of a "plea bargain," entered a plea of guilty to the lesser included offense, under the second count of the indictment, of POSSESSION OF AN INCENDIARY DEVICE (a Class D Felony) in violation of Penal Law Section 265.05(1). Thereafter and in accordance with the "plea bargain," the defendant was sentenced on December 27, 1972 to an indeterminate term of imprisonment having a maximum of five years. No notice of appeal was filed from this judgment of conviction.

Attached hereto and made a part hereof is an affidavit previously submitted by your deponent in regard to a similar motion by the co-defendant CACI. It should be noted that plea negotiations were very extensive and concerned what sentences the defendants would receive. Moreover, the factual basis of the indictment was not discussed in detail and deponent did not make any specific statements regarding the presence of dynamite.

However, during deponent's preparation for trial, and prior to the negotiation of the "plea bargain," deponent had the "re-packed" tube analyzed by the Syracuse Police Department Crime Laboratory. The attached report indicates that the "Nitroglycerine was present in the re-packed tube." A copy of this report is attached hereto and made a part hereof. As such defendant's contentions concerning "factual

Affidavit of John M. Shannon.

impossibility" are incorrect.

In addition to Judge Gale's memorandum decision, dated July 31, 1974 (a copy of which is attached), in regard to a somewhat similar motion by co-defendant CACI, deponent would refer this court to the recent case of People v. Francis (38 N.Y.2d 150). In Francis, the Court of Appeals stated that:

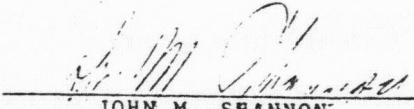
... a plea may be to a hypothetical crime (People v. Foster, 19 N.Y.2d 150), or to a crime for which the facts alleged to underline the original charge would not be appropriate (People v. Clairborne, 29 N.Y.2d 950; People v. Griffin, 7 N.Y.2d 511; cf. People v. Selikoff, 35 N.Y.2d 227, 235, cert.den.419 U.S.1122).

...

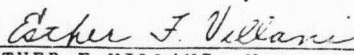
... Where the court which accepts the plea has no reason to believe that the plea is unfair or inappropriate, the bargain becomes final. Unless there was unfairness in its negotiation or acceptance, the fact that a loophole might have been available to defendant is not sufficient grounds upon which to set aside the bargain made (id., at 155, 156).

7 Your deponent knows that no unfairness existed in the plea negotiations and that the plea was not inappropriate. As such defendant's bargain is final.

WHEREFORE, your deponent respectfully requests an order of the court denying defendant's motion in its entirety.


JOHN M. SHANNON

Subscribed and sworn to before me
this 24th day of February, 1976.


ESTHER F. VILLANI, Notary Public
Onondaga County, New York
Comm. Exp. 3/30/77.

Affidavit of John M. Shannon.

AFFIDAVIT

STATE OF NEW YORK
COUNTY OF ONONDAGA }
CITY OF SYRACUSE } SS:

John M. Shannon

, being duly sworn, deposes and says:

That he is a Senior Assistant District Attorney of Onondaga County; that he has been with the District Attorney's Office as a full-time Assistant District Attorney since January 1, 1970. During the spring of 1972, I was assigned the prosecution of Peo. vs Vincent Caci. Indictment No. 71-142, pending against him and his co-defendants Leonard Fambo and Peter Talarico. Said indictment charged each of the defendants with two counts of Possession of an Explosive Substance in violation of §265.05 (7) of the Penal Law, said crime being a Class "B" felony.

Said indictment was set for trial before the Honorable Ormand N. Gale on October 27, 1972. Immediately prior to the commencement of jury selection, a series of pretrial discussions were had between Saltonstenberg, Attorney for Leonard Fambo, Paul R. Shanahan, Attorney for Peter Talarico and Patrick J. Cunningham, the Attorney for Vincent Caci. During the course of said pretrial discussions, I indicated that the District Attorney's Office would be willing to accept a plea to a reduced charge of Possession of an Incendiary Device in violation of §265.05(1) of the Penal Law, a Class "D" felony, in full satisfaction of the charges pending against each of the defendants.

As part of the plea bargaining discussions, the following recommendations regarding sentencing were made by me and agreed to by Judge Gale. In the event that Vincent Caci was to receive a term of incarceration, it would not exceed three years with no minimum period of imprisonment being set. Leonard Fambo was to receive a maximum of five years with no minimum and that no prior felony offender information would be filed with this office. Talarico, if incarcerated, would not receive in excess of three years incarceration with no minimum.

When I was assigned this case, I discussed the nature of it with various members of the staff. At that time, Assistant District Attorney Richard Lyons informed me that he had represented Vincent Caci prior to his becoming an Assistant District Attorney and that, therefore, he could not participate in this case. Upon receipt of this information, I terminated any discussion of the case with Mr. Lyons. The pretrial negotiations were handled exclusively by myself, and at no time was Mr. Lyons consulted regarding the possible disposition of this case.

The defendant, Vincent Caci, was sentenced on December 27, 1972 to an indeterminate term of imprisonment with a maximum of three years. Since I was engaged elsewhere on that date, I asked Mr. Lyons to handle the sentencing pursuant to the plea agreement entered into on October 11. It is my understanding that Mr. Lyons did nothing more than move the sentence on that date and that the defendant was sentenced pursuant to the earlier agreement.

John M. Shannon

Subscribed and sworn to before me
on 28th day of June 1974.

John M. Shannon
Notary Public, Onondaga County, N.Y.
N. Exp. 3/30/75

Affidavit of John M. Shannon.

INVESTIGATION REPORT FD-5 Rev 11/66		L-43237		1. Arrestee, Complainant, Driver #1, Victim: TOLERICO, CACCI, FAMBO		2. Arrest No.		3. Complaint No. 70-19920	
Form used as continuation sheet or a current report.		☐ Form used to report followup investigation or supplemental information.		Page Number 1 of 1					
Extra Copies		5. Traffic Citation #		6. Original Classification BOMB POSSESSION		7. Date of offense or original Report 1 DEC 70			
8. If report continued:		☐ Followup or supplemental		9. Classification Changed? ☐ Yes (If "yes", show new classification) ☐ No					
Status: ☐ Unfounded ☐ Cleared ☐ Not Cleared		11. Further Action Required: ☐ Yes ☐ No		12. Additional or new Property loss \$		13. Value of Recovered Property \$			
PERSONS INTERVIEWED: (Justify by code) V - Victim S - Suspect F - Parent D - Driver W - Witness O - Other interested party (Explain in narrative)									
Name		Address				Age		Telephone	
ACTIONS FOR FOLLOWUP OR FURTHER USAGE: Record all developments in the case subsequent to last report. Describe and record value of additional lost or stolen property since original report; recovered property; names and arrest numbers of persons arrested; classification change; show disposition of recovered property.									
FINDINGS: Received from Det. J. Wolf at the Laboratory by Robert Wilson, Chemist, on 24 OCT 72 a cardboard tube labeled "DuPont Special Gelatine, 40% strength, Danger, Explosive". The tube was in a plastic bag when received and a tag attached was labeled "70-19920, 1 DEC 70 Ditch Townline Rd., T/O Dewitt". One end of the tube was partially open and I removed a portion of the contents from the top. The portion removed consisted of wood shavings and brown dry chunks with yellow particles.									
3: The brown chunks were tested and found to contain nitroglycerin. The tests used consisted of two color tests, one thin layer chroma- tographic examination and a comparison of the infrared spectrum obtained from an extract of the brown chunks with the infrared spectrum of a known sample of nitroglycerin. The yellow particles in the brown chunks were identified as being sulfur.									
CONCLUSION: Nitroglycerine was detected in the brown chunks inside the card- board tube. Nitroglycerine is explosive. The lower portion of the tube was packed with wood shavings and small metal caps.									
F - District Attorney - Laboratory									
17. Reporting Officer <i>Robert Wilson</i> Robert Wilson, Chemist #536 THU 26 OCT 72 1402 Lt. V.G. McNett #223									
18. Approving Supervisor <i>[Signature]</i> 19. Review Clerk									

Memorandum of County Court.

STATE OF NEW YORK
COUNTY COURT

COUNTY OF ONONDAGA

THE PEOPLE OF THE STATE OF NEW YORK

-vs-

Indictment No. 71-142

VINCENT CACI

Index No. 70/857

APPEARANCES: JON K. HOLCOMBE, ESQ.
 District Attorney of Onondaga County
 PATRICK CONNELLY, ESQ., of counsel
 Attorney for the People

MATTAR, MATTAR, D'AGOSTINO AND KEEFE, ESQS.
 THOMAS C. D'AGOSTINO, ESQ., of counsel
 Attorney for Defendant

GALE, J.

MEMORANDUM

Defendant moves to vacate the plea and subsequent sentence entered in this Court on December 27, 1972.

The facts briefly stated are as follows: Defendant was indicted with two other individuals on two counts of POSSESSION OF AN EXPLOSIVE SUBSTANCE in violation of §265.05(7) of the Penal Law. The first count relates to an incident on Nov. 29, 1970 and the second count to an incident on Dec. 1, 1970.

On Oct. 27, 1972 the indictment was moved for trial on both counts. That same morning, a pre-trial conference was held and the plea to the felony of POSSESSION OF AN INCENDIARY DEVICE in violation of §265.05(1) of the Penal Law was accepted in full satisfaction of both counts of the indictment, as a lesser included offense of the second count of the indictment.

Thereafter on Dec. 27, 1972 defendant was sentenced to an indeterminate sentence of imprisonment of up to three years.

Since the sentencing date, the defendant appears to have been tried and acquitted in United States District Court for the Western District of New York for an alleged Hobbs Act violation.

Memorandum of County Court.

In the course of that Federal trial, evidence appears to have been elicited showing that on or about Nov. 29, 1970 dynamite was located in a vacant field. The contents were removed by police officers and replaced with non-explosive substances. The area was staked and defendant was arrested on Dec. 1, 1970, along with the co-defendants, in the vicinity of the vacant field where the dynamite tube had, in the interim, been returned with non-explosive substances replaced therein.

Defendant states that the indictment in the above circumstances improperly alleges that powder and nitroglycerin were in the dynamite tube on Dec. 1, 1970 and defendant concludes that his plea to a lesser included crime, premised upon an erroneous allegation in the indictment, should be vacated.

The charges in the indictment would have been subject to a defense, had the matter proceeded to trial. In the circumstances presented, the sufficiency of the substantive allegations in the indictment cannot now be attacked collaterally. (Peo. v. Griffin, 7 N.Y.2d 511).

At the time of the plea and the sentencing, the applicable law of this state provided that upon a plea to a lesser crime, a factual basis for the plea neither had to be elicited nor even exist. (Peo. v. Clairborne, 29 N.Y.2d 950, cf. Peo. v. Castro, 356 N.Y.S.2d 49).

As to the defendant's present allegation that the District Attorney improperly represented that the dynamite tube contained explosive material, the District Attorney could have properly relied upon the face of the indictment in plea bargaining negotiations. It was a matter for the defendant, prior to plea, to request inspection of the Grand Jury Minutes to ascertain the existence of a prima facie case. Upon defendant's plea, defendant must be determined to have acquiesced in the indictment to the

Memorandum of County Court.

Peo. v. Vincent Caci

- 3 -

extent his bargained plea encompasses the charges in the indictment. A bargained plea is not a tool to adjourn trial of the indictment, but rather a termination of substantive litigation subject to errors in the plea and sentencing procedures, which may, themselves, then become a subject of motions to vacate or appellate review. (Peo. v. Lynn, 28 N.Y.2d 196).

Defendant further alleges that his former attorney, Richard Lyons, was later the Assistant District Attorney who represented the People during plea bargaining and at the sentencing.

The record demonstrates that another Assistant District Attorney, John Shannon, called the case at the time of plea and stated the position of the District Attorney's Office in requesting the Court to accept the plea as a lesser included offense. The defendant was represented by independent, competent counsel at the time of plea and sentencing. At the sentencing, Assistant District Attorney Lyons moved the case for sentencing and stated to the Court as follows:

"Mr. Lyons: Again, Your Honor, our position was expressed to the Court at the time the plea was entered".

In addition, an affidavit of Richard Lyons submitted in response to the present motion, states that he did not discuss the facts, evidence or merits of the charges with the Assistant District Attorney assigned to the prosecution of this indictment. An affidavit of Assistant District Attorney John Shannon corroborates this affidavit of Richard Lyons.

This Court is satisfied that Assistant District Attorney Richard Lyons in no way influenced the prosecution, defense or the Court, itself, or otherwise acted in any manner prejudicial to the defendant.

Memorandum of County Court.

Peo. v. Vincent Caci

-4-

The defendant's plea was knowingly and willingly entered into and was not coerced in any manner, whatsoever.

Defendant's motion is denied in all respects without a hearing.

Submit Order accordingly.

ORMAND N. GALE

DATED: SYRACUSE, NEW YORK

JULY 31st, 1974

Order of County Court.

At a Term of the County Court held in
and for the County of Onondaga at the
Courthouse in the City of Syracuse,
New York on the 1st day of March, 1976.

PRESENT: THE HONORABLE ORMAND N. GALE,
County Court Judge.

COUNTY COURT COUNTY OF ONONDAGA

THE PEOPLE OF THE STATE OF NEW YORK

(INDICTMENT NO.71-142)

v.

INDEX #70/857 (Criminal)

LEONARD FAMBO

Upon the motion of the defendant by his attorney PHILIP B. ABRAMOWITZ, ESQ., for an order setting aside his guilty plea pursuant to Criminal Procedure Law Article 440; and upon the answer of JOHN M. SHANNON, ESQ., Chief Assistant District Attorney of Onondaga County, in opposition thereto; and upon the Court's previous decision in an Article 440 motion by the co-defendant Vincent Caci dated July 31, 1974; it is

ORDERED that the defendant LEONARD FAMBO'S motion is hereby denied.

E N T E R

ORMAND N. GALE, County Court Judge.

Signed: March /0 , 1976.

County Court,

COUNTY OF ONONDAGA

THE PEOPLE OF THE STATE OF NEW YORK

AGAINST,

Vincent
~~STEVEN~~ CACI
 LEONARD FAMBO
 PETER TALARICO

Indictment No. 71-142

Index No. 70/857

The Grand Jury OF THE COUNTY OF ONONDAGA by this indictment accuse

Vincent
~~STEVEN~~ CACI, LEONARD FAMBO, PETER TALARICO

of the crime of POSSESSION OF EXPLOSIVE SUBSTANCE

in violation of Section 265.05(7)
 of the Penal Law of the State of New York

INCENDIARY DEVICE
§ 265.05(1)

committed as follows:

The said

Vincent
~~STEVEN~~ CACI, LEONARD FAMBO, PETER TALARICO

on or about the 29th day of November, nineteen hundred and

seventy, at the Town of Dewitt, in this county
 had in their possession a bomb, a stick of dynamite containing
 powder and nitroglycerin, and blasting cap, with intent to use the
 same unlawfully against another.

SECOND COUNT

AND THE GRAND JURY AFORESAID, by this indictment, further
 accuse the defendants of the crime of POSSESSION OF EXPLOSIVE
 SUBSTANCE, in violation of Section 265.05(7) of the Penal Law of
 the State of New York, committed as follows: - *(1)*

The defendants, on or about the 1st day of December 1970, at
 the Town of Dewitt, in this county, had in their possession a stick
 of dynamite containing powder and nitroglycerin, and blasting cap,
 with intent to use the same unlawfully against another.

DISTRICT ATTORNEY

Order of Judge Curtin Granting a certificate
of probable cause.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

LEONARD FANBO,

Petitioner

-vs-

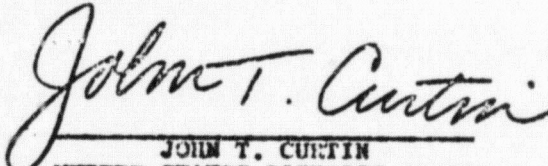
CIV-76-4

HAROLD J. SMITH, Superintendent
Attica Correctional Facility

Respondent

By my order dated June 23, 1977, I denied a
certificate of probable cause in this action. Upon
reconsideration, I have decided that a certificate
of probable cause should be granted.

So ordered.


JOHN T. CURTIN
UNITED STATES DISTRICT JUDGE

DATED: June 27, 1977

//

Transcript of plea proceedings.

1 STATE OF NEW YORK
2 COUNTY COURT COUNTY OF ONONDAGA
3 THE PEOPLE OF THE STATE OF NEW YORK

4 v

INDICTMENT #71-142
PLEA

5 LEONARD FAMBO

6
7 Proceedings before Hon. Ormand N. Gale, Onondaga
8 County Court Judge, at the courthouse, Syracuse,
New York, on October 27, 1972.

9 APPEARANCES JOHN M. SHANNON, ESQ., Assistant
10 District Attorney of the County of
Onondaga, Attorney for the People;

11 SALTON RODENBURG, ESQ., Attorney
12 for the defendant.

13 MR. SHANNON: Call also the case of Leonard Jo-
14 seph Fambo, Indictment number 71-142. You are Leonard
15 Fambo?

16 THE DEFENDANT: Yes sir.

17 MR. SHANNON: And you appear with your attorney,
18 Salton Rodenburg, is that correct?

19 THE DEFENDANT: Yes sir.

20 MR. SHANNON: Mr. Fambo, upon your arraignment
21 on Indictment number 71-142 you entered a plea of not
22 guilty to the two counts contained therein, and likewise,
23 your case was on for trial this morning and after a pre-
24 trial conference between your attorney and the Court and
25 myself, we have indicated a willingness to accept a plea

Transcript of plea proceedings.

1 to the Class "D" Felony of Possession of an Incendiary
2 Device in violation of Section 265.05 (1) of the Penal Law.
3 Now, we would ask the Court to accept this as a lesser
4 included offense of the second count of the indictment
5 Your Honor.

6 THE COURT: All right Mr. Pambo, I ask you the
7 same questions as I asked Mr. Caci. You have conferred
8 at length with your counsel this morning in this case, is
9 that right?

10 THE DEFENDANT: Yes sir.

11 THE COURT: And you realize that if you enter
12 this plea you will be waiving your right to trial by jury?

13 THE DEFENDANT: Yes sir.

14 THE COURT: And has he also told you that this
15 proposed plea is to a Class "D" Felony which carries a
16 maximum of seven years?

17 THE DEFENDANT: Yes sir.

18 THE COURT: Did he tell you also that in your
19 case I have agreed, as a result of conference with him in
20 chambers and with the District Attorney and on the reco-
21 mmendation of the District Attorney, that your sentence
22 will not exceed five years if you enter this plea?

23 THE DEFENDANT: Yes.

24 MR. RODENBURG: Up to five. You understand that?

25 THE DEFENDANT: Yes.

Transcript of plea proceedings.

1 MR. RODENBURG: He can't hear you Your Honor.

2 THE DEFENDANT: I can't hear.

3 THE COURT: All right. How do you wish to plead
4 to Possession of an Incendiary Device in violation of
5 Section 265.05 (1) of the Penal Law?

6 THE DEFENDANT: Guilty.

THE COURT: All right. Statistics.

* * *

AFFIDAVIT OF SERVICE BY MAIL

RE: Leonard Fambo

vs

Harold J. Smith, Supt. Attica Correctional

State of New York)
County of Genesee) ss.:
City of Batavia)

I, Leslie R. Johnson being
duly sworn, say: I am over eighteen years of age
and an employee of the Batavia Times Publishing
Company, Batavia, New York.

On the 13th day of September, 19 77
I mailed copies of a printed Appendix in
the above case, in a sealed, postpaid wrapper, to:

10 copies to: A. Daniel Fusaro, Clerk
U.S. Court of Appeals, Second Circuit
New Federal Court House, Foley Square
New York, New York 10007

2 copies to: Hon. Louis J. Lefkowitz, Attorney General
Att: Alan Sharett, Assistant Attorney General
2 World Trade Center
New York, New York 10047

at the First Class Post Office in Batavia, New
York. The package was mailed Special Delivery at
about 4:00 P.M. on said date at the request of:

Gross, Shuman, Laub & David, Att: Philip B. Abramowitz, Esq.

2600 Main Place Tower, Buffalo, New York 14202

Leslie R. Johnson

Sworn to before me this

13th day of September, 19 77

Patricia A. Lacey

PATRICIA A. LACEY

NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 1978